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Attorneys for Defendants William Tull, Daniel Gibby and  
Gibby Novelties, LLC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PAUL MONTWILLO, an individual	)	CASE NO. C 07 3947 SI
	)	
Plaintiff,	)	DECLARATION OF DAVID Y. WONG IN
	)	SUPPORT OF EX PARTE APPLICATION
vs.	)	FOR ORDER SHORTENING TIME RE:
	)	MOTION TO CONTINUE PRE-TRIAL
WILLIAM TULL; DANIEL GIBBY;	)	CONFERENCE AND TRIAL DATES
GIBBY NOVELTIES, LLC dba ARSENIC	)	PURSUANT TO LOCAL RULE 6-3
& APPLE PIE, a California Limited	)	
Liability Corporation and DOES 1 through	)	
20, inclusive,	)	
	)	The Federal Building
Defendants.	)	450 Golden Gate Avenue
	)	San Francisco, CA 94102

And related Counter-Claim

Complaint filed: August 1, 2007

I, David Y. Wong, declare:

- I am an attorney licensed by the State of California, admitted to practice before this Court since 1982, and I am co-counsel for Defendants William Tull, Daniel Gibby and

MONTWILL V. TULL, ET AL. USDC Action No. C 07 3947 SI

Declaration of Wong – Defendants' Ex Parte Application For Order Shortening Time Re: Motion To Continue Pre-Trial Conference And Trial Dates Pursuant To Local Rule 6-3

1 Gibby Novelties, LLC. I am authorized by my clients to make this Declaration in  
2 support of their Ex Parte Application for Order Shortening Time Regarding Motion To  
3 Continue Pre-Trial Conference And Trial Dates Pursuant To Local Rule 6-3,  
4 submitted herewith.

- 5  
6 2. In November of 2007, I received a Pre-Trial Preparation Order from this Court setting  
7 the cutoff date for dispositive motions to be heard by April 25, 2008. The Order  
8 established a deadline for the disclosure of expert witnesses on May 12, with rebuttal  
9 experts to be disclosed by May 19, and expert depositions to be held by May 30. It  
10 further set a Pre-Trial Conference for June 17, and a Trial date on June 30, 2008;
- 11 3. On April 25, 2008, a hearing was held before this Court regarding cross motions for  
12 summary judgment brought by Plaintiff and Defendants. The matter was taken  
13 under submission by the Court at the conclusion of the hearing, with no mention of a  
14 further settlement conference date or related action;
- 15 4. Late in the afternoon of May 13, 2008, I received an electronic notice from this Court  
16 advising that Plaintiff had filed and served an Expert Witness Disclosure after the  
17 expiration of the deadline set by the Court in its Pretrial Scheduling Orders;
- 18 5. On May 14, 2008, I sent a letter to Plaintiff's Counsel demanding that he cure the  
19 defect in Plaintiff's Disclosure and stipulate to an extension of time for Defendants to  
20 disclose a rebuttal expert;
- 21 6. On May 15, 2008, I received a letter faxed from Plaintiff's Counsel in which he  
22 refused to provide a report from his retained expert and further advised that Mr.  
23 Cutler would charge a fee for a deposition to be notice through Counsel;
- 24 7. On May 16, 2008, I again advised Plaintiff's Counsel that Plaintiff's Expert Disclosure  
25 was deficient and demanded that it be cured or that Plaintiff provide legal authority  
26 for his position by May 19, 2008;
- 27 8. Plaintiff completely ignored my request and a motion to compel and for sanctions  
28 was filed on behalf of Defendants on May 23, 2008;

- 1 9. On May 28, 2008, the Court issued a Notice that Defendants' discovery motion will  
2 be deemed submitted without argument and ordered any Opposition to be filed by  
3 June 4, 2008;
- 4 10. On June 2, 2008, I received the Court's ruling on the cross motions for summary  
5 judgment. The following day, I wrote to Plaintiff's Counsel asking whether he would  
6 stipulate to a motion to extend the Pre-Trial Conference and Trial dates based on the  
7 lateness of the Court's ruling and the pending Motion to Compel. A True and correct  
8 copy of my letter of June 3 is attached as Exhibit 1;
- 9 11. On June 3, I received a call from Opposing Counsel indicating his refusal to stipulate  
10 to a motion to continue as well as to a motion for order shortening time;
- 11 12. I further note that as of the date of this Declaration, Plaintiff has failed to comply with  
12 Local Rules in that he has failed to submit to the Court, or for review by Defendants,  
13 a Pre-Trial Conference Statement at least ten court days prior to the Conference.  
14 Since the Conference is set for June 17, the required joint statement was due on  
15 June 3, 2008;
- 16 13. Your Declarant submits that good cause does exist for this Court to grant the instant  
17 Ex Parte Application setting a hearing date for Defendants' Motion to continue the  
18 Pre-Trial Conference and Trial. Not only is the additional time warranted by the need  
19 for the Court to consider and rule on Defendants' motion to compel, it will allow the  
20 Court to refer or conduct a further settlement conference as it stated it would at the  
21 March 14, 2008 Case Management Conference. The refusal of the Court to grant  
22 the instant Ex Parte Application for Order Shortening Time would severely prejudice  
23 and harm Defendants who have reasonably relied on the representations of this  
24 Court. A true and correct copy of Defendants' Proposed Motion for Continuance of  
25 Trial is attached as Exhibit 2.
- 26  
27  
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1 I certify under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct, and that I am able to testify competently thereto.

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4 Executed in Mill Valley, California on June 4, 2008.

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7 David Y. Wong  
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A handwritten signature in black ink, appearing to read 'D. Wong', is written over a horizontal line. The signature is stylized with a large, looped 'D' and a cursive 'Wong'.

**EXHIBIT 1**

**DAVID Y. WONG**

ATTORNEY AT LAW

100 Shoreline Hwy, Suite 100B  
Mill Valley, California 94941  
Tel. (415) 339-0430  
Fax. (415) 332-8679  
e-mail: dwong91@yahoo.com

June 3, 2008

Via Facsimile

Stephen Sommers  
870 Market Street, Suite 1142  
San Francisco, CA 94102

Re: *Montwillo v. William Tull, Daniel Gibby and Gibby Novelties, LLC*  
USDC Action 07-03947 SI

Dear Mr. Sommers:

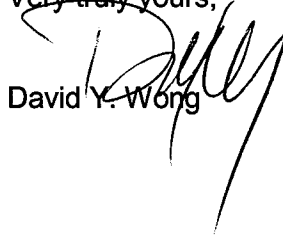
In light of the Court's recent issuance of its ruling on the cross motions for Summary Judgment in this matter, and the pending matter of Defendants' Motion to compel the production of an expert witness report, or alternatively, to strike Plaintiff's Disclosure, Defendants seek to postpone and extend the Pretrial Conference and Trial dates in this matter.

Please advise at your earliest opportunity whether Plaintiff will stipulate to a motion under Local Rule 6-2 to extend the Pretrial Conference and Trial dates.

Should you have any questions or other concerns regarding the above, please do not hesitate to contact me.

Very truly yours,

David Y. Wong



Cc: M. Greenberg

**EXHIBIT 2**

David Y. Wong, Attorney at Law (SBN 105031)  
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Tel: (415) 442-6611

Attorneys for Defendants William Tull, Daniel Gibby and  
Gibby Novelties, LLC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PAUL MONTWILLO, an individual	)	CASE NO. C 07 3947 SI
	)	
Plaintiff,	)	NOTICE OF MOTION AND MOTION OF
	)	DEFENDANTS WILLIAM TULL, DANIEL GIBBY
vs.	)	AND GIBBY NOVELTIES, LLC FOR ORDER
	)	TO CONTINUE PRE-TRIAL CONFERENCE
WILLIAM TULL; DANIEL GIBBY;	)	AND TRIAL DATES PURSUANT TO LOCAL
GIBBY NOVELTIES, LLC dba ARSENIC	)	RULE 6-3; DECLARATION OF DAVID Y.
& APPLE PIE, a California Limited	)	WONG AND EXHIBITS IN SUPPORT OF
Liability Corporation and DOES 1 through	)	MOTION; AND PROPOSED ORDER
20, inclusive,	)	
	)	Hearing Date:
Defendants.	)	Hearing Time: a.m./p.m.
	)	Ctrm: 10

Complaint filed: August 1, 2007  
Trial date: June 30, 2008

NOTICE IS HEREBY GIVEN, that on June \_\_, 2008, at \_\_\_\_\_ in Courtroom 10 of  
the above-entitled Court, DEFENDANTS WILLIAM TULL, DANIEL GIBBY AND GIBBY  
NOVELTIES, LLC, a California Limited Liability Company, will and do hereby move the Court for  
an Order to extend the dates of the Pre-trial Conference and Trial pursuant to Local Rule 6-3.  
Defendants' Motion is brought for multiple reasons, namely that the Court's recent issuance of  
its ruling on the cross Motions for Summary Judgment, and the pending Motion of Defendants to

MONTWILLO V. TULL, ET AL. USDC Action No. C 07 3947 SI


MOTION OF DEFENDANTS WILLIAM TULL, DANIEL GIBBY AND GIBBY NOVELTIES, LLC FOR ORDER TO  
CONTINUE PRE-TRIAL CONFERENCE AND TRIAL DATES PURSUANT TO LOCAL RULE 6-3



1 compel the production of an expert witness report, or to strike Plaintiff's Expert Witness  
2 Disclosure have made it extremely difficult, if not impossible for Defendants to adequately  
3 prepare for the Pretrial Conference and Trial of this matter. As shown below, the circumstances  
4 surrounding these two events have and will, if not cured, hamper and severely prejudice  
5 Defendants' ability to prepare for trial. In addition, Defendants believe that it is in the best  
6 interests of both parties that the Court conduct further settlement discussions as it stated it  
7 would in at the Case Management Conference of March 14, 2008.

8 This Motion for Order Extending the dates of the Pre-Trial Conference and Trial will be  
9 based on this Notice of Motion and Motion and the Supporting Declaration of David Y. Wong  
10 and attached Exhibits, the pleadings on file in this case, and such other evidence as may be  
11 presented at the hearing on this motion.

12  
13 DATED: June 4, 2008

  
\_\_\_\_\_  
David Y. Wong, Attorney at Law  
Marc H. Greenberg, Attorney at Law;  
Attorneys for Defendants William Tull, Daniel  
Gibby and Gibby Novelties, LLC

**Legal Argument**

**DEFENDANTS' MOTION TO EXTEND PRE-TRIAL CONFERENCE AND TRIAL DATES  
PURSUANT TO LOCAL RULE 6-3**

On November 16, 2007, the Court issued its Pre-Trial Preparation Order setting the trial of this matter for June 30, 2008, and a Pre-trial Conference on June 17, 2008. On March 14, 2008, a further Case Management Conference was held, at which time the Court Minutes reflect that all dispositive motions would be heard on April 25, 2008. The Minutes further state:

"At the 4/25/08 motion hearing, the Court will refer this case to a further settlement conference."

On April 25, 2008, the parties presented cross motions for summary judgment. After oral argument, the Court took the matter under submission. Its ruling was issued on June 2, 2008. In the interim and to date, Defendants have not received any instructions, indications or comments from the Court concerning participation in a further settlement conference.

The Court's Pre-trial Preparation Order further ordered that the parties designate expert witnesses for trial by May 12, 2008, with rebuttal experts to be disclosed a week later and expert discovery to be conducted by May 30. Plaintiff filed an expert witness disclosure after the deadline had elapsed. The disclosure was defective and deficient in that the witness was not fully identified, nor was a report prepared by the witness and setting forth his opinions attached to the disclosure.

Defendants immediately wrote to Plaintiff's Counsel, demanding compliance with FRCP Rule 26(a)2(b). Plaintiff's Counsel refused. On May 16, Defendants wrote again, setting forth additional support for their demand and providing a deadline of May 19 to respond. No response was forthcoming from Plaintiff's Counsel. Consequently, on May 23, Defendants filed a Motion to Compel the Production of an Expert Report or, in the alternative, for an Order Striking Plaintiff's Disclosure and for Sanctions. The Court has since deemed the motion

MONTWILLO V. TULL, ET AL. USDC Action No. C 07 3947 SI

MOTION OF DEFENDANTS WILLIAM TULL, DANIEL GIBBY AND GIBBY NOVELTIES, LLC FOR ORDER TO  
CONTINUE PRE-TRIAL CONFERENCE AND TRIAL DATES PURSUANT TO LOCAL RULE 6-3

1 submitted without argument and ordered any opposition from Plaintiff to be filed on or before  
2 June 4, 2008.

3 The timing of the Court's ruling has, through no fault of the Court, frustrated and  
4 impeded Defendants' efforts to prepare for the Pre-trial Conference and Trial. By issuance of a  
5 ruling on a potentially dispositive motion less than 30 days before the trial date, Defendants and  
6 Counsel have been placed in the unusually difficult position of having to weigh the relative  
7 merits and benefits, and incurring the substantial expense, of properly preparing for trial against  
8 the credible possibility that one of the motions may be granted. At the same time, Defendants  
9 have reasonably understood that the Court would refer the case to a further settlement  
10 conference if the matter was not resolved at the April 25 hearing.

11 Prudently weighing the substantial costs of trial preparation against the two factors of a  
12 pending dispositive motion and the Court's promise to conduct a further settlement conference,  
13 Defendants have partially elected to defer their trial preparation and focus their resources in  
14 anticipation of a dispositive ruling or another settlement conference. Defendants' reliance is  
15 reasonable and was prudent given the circumstances and the information provided.

16 Compounding the situation and substantially prejudicing Defendants' ability to prepare  
17 for trial is the defective nature of Plaintiff's tardy expert witness disclosure, particularly Plaintiff's  
18 failure to fully disclose his expert and provide a report prepared by the expert discussing his  
19 opinions and the information relied upon. As discussed at length in Defendants' pending motion  
20 to compel, Plaintiff's Disclosure openly flaunts and ignores the deadlines set by this Court, as  
21 well as the specific disclosure requirements under Rule 26(a)2. Despite repeated attempts by  
22 Defendants to meet and confer, Plaintiff and his Counsel refuse to comply or cite any authority  
23 in support of their position. Indeed, it seems clear that Counsel has no interest at all in clarifying  
24 what his position is.

25 As a consequence of the foregoing, Defendants are unable to prepare for trial nor fully  
26 comply with the Court's Local Rules as they relate to the Pre-trial Conference requirements.  
27 Plaintiff's refusal to cure or withdraw his tardy and defective Expert Witness Disclosure further  
28 renders Defendants unable to depose the witness, disclose a rebuttal expert, or to ascertain the


MONTWILLO V. TULL, ET AL. USDC Action No. C 07 3947 SI

MOTION OF DEFENDANTS WILLIAM TULL, DANIEL GIBBY AND GIBBY NOVELTIES, LLC FOR ORDER TO  
CONTINUE PRE-TRIAL CONFERENCE AND TRIAL DATES PURSUANT TO LOCAL RULE 6-3

1 sum and substance of the expert's opinions for trial. Curiously, while Plaintiff's Counsel refuses  
2 to stipulate to Defendant's motion to extend the date of the Pre-trial Conference and Trial, it  
3 should be noted that Plaintiff has blatantly failed and neglected to submit and file the required  
4 papers and materials for trial in accordance with the Local Rules. No doubt, Counsel feels  
5 unrestrained by the Local Rules, however, Defendants hope and pray that the Court does not  
6 share in that position.

7 Based on the foregoing, Defendants respectfully ask that this Court extend the dates  
8 of the Pre-trial Conference and Trial in this matter approximately 60 days, during which it may  
9 rule on Defendants' Motion to Compel and refer the matter to a further settlement conference.

10  
11 DATED: June 4, 2008

  
12 \_\_\_\_\_  
13 David Y. Wong, Attorney at Law  
14 Marc H. Greenberg, Attorney at Law;  
15 Attorneys for Defendants William Tull, Daniel  
16 Gibby and Gibby Novelties, LLC  
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Attorneys for Defendants William Tull, Daniel Gibby and  
Gibby Novelties, LLC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PAUL MONTWILLO, an individual	)	CASE NO. C 07 3947 SI
	)	
Plaintiff,	)	DECLARATION OF DAVID Y. WONG IN
	)	SUPPORT OF MOTION FOR ORDER TO
vs.	)	CONTINUE PRE-TRIAL CONFERENCE AND
	)	TRIAL DATES PURSUANT TO LOCAL RULE
	)	6-3
WILLIAM TULL; DANIEL GIBBY;	)	
GIBBY NOVELTIES, LLC dba ARSENIC	)	
& APPLE PIE, a California Limited	)	
Liability Corporation and DOES 1 through	)	Date: June , 2008
20, inclusive,	)	9:00 a.m.
	)	Judge Ilston, Courtroom 10
Defendants.	)	

And related Counter-Claim

The Federal Building  
450 Golden Gate Avenue  
San Francisco, CA 94102

Complaint filed: August 1, 2007

I, David Y. Wong, declare:

- I am an attorney licensed by the State of California, admitted to practice before this Court since 1982, and I am co-counsel for Defendants William Tull, Daniel Gibby and

MONTWILL V. TULL, ET AL. USDC Action No. C 07 3947 SI

1

1 Gibby Novelties, LLC. I am authorized by my clients to make this Declaration in  
2 support of their Motion for Order Shortening Time and Motion To Continue Pre-Trial  
3 Conference And Trial Dates Pursuant To Local Rule 6-3, filed herewith.

- 4 2. In November of 2007, I received a Pre-Trial Preparation Order from this Court setting  
5 the cutoff date for dispositive motions to be heard by April 25, 2008. The Order  
6 established a deadline for the disclosure of expert witnesses on May 12, with rebuttal  
7 experts to be disclosed by May 19, and expert depositions to be held by May 30. It  
8 further set a Pre-Trial Conference for June 17, and a Trial date on June 30, 2008;
- 9 3. On March 14, 2008, I attended a Case Management Conference before this Court  
10 wherein the Pre-trial Preparation Order dates were confirmed. In addition, the Court  
11 advised both parties that if the dispositive motions to be filed were not granted, that  
12 the Court would refer the case to a further settlement conference;
- 13 4. The above was confirmed in the Court's Pretrial Minutes of the same date;
- 14 5. On April 25, 2008, a hearing was held before this Court regarding cross motions for  
15 summary judgment brought by Plaintiff and Defendants. The matter was taken  
16 under submission by the Court at the conclusion of the hearing, with no mention of a  
17 further settlement conference date or related action;
- 18 6. Late in the afternoon of May 13, 2008, I received an electronic notice from this Court  
19 advising that Plaintiff had filed and served an Expert Witness Disclosure after the  
20 expiration of the deadline set by the Court in its Pretrial Scheduling Orders;
- 21 7. On May 14, 2008, I sent a letter to Plaintiff's Counsel demanding that he cure the  
22 defect in Plaintiff's Disclosure and stipulate to an extension of time for Defendants to  
23 disclose a rebuttal expert;
- 24 8. On May 15, 2008, I received a letter faxed from Plaintiff's Counsel in which he  
25 refused to provide a report from his retained expert and further advised that Mr.  
26 Cutler would charge a fee for a deposition to be notice through Counsel;
- 27  
28

- 1 9. On May 16, 2008, I again advised Plaintiff's Counsel that Plaintiff's Expert Disclosure  
2 was deficient and demanded that it be cured or that Plaintiff provide legal authority  
3 for his position by May 19, 2008;
- 4 10. Plaintiff completely ignored my request and a motion to compel and for sanctions  
5 was filed on behalf of Defendants on May 23, 2008;
- 6 11. On May 28, 2008, the Court issued a Notice that Defendants' discovery motion will  
7 be deemed submitted without argument and ordered any Opposition to be filed by  
8 June 4, 2008;
- 9 12. On June 2, 2008, I received the Court's ruling on the cross motions for summary  
10 judgment. The following day, I wrote to Plaintiff's Counsel asking whether he would  
11 stipulate to a motion to extend the Pre-Trial Conference and Trial dates based on the  
12 lateness of the Court's ruling and the pending Motion to Compel;
- 13 13. On June 3, I received a call from Opposing Counsel indicating his refusal to stipulate  
14 to a continuance of the Pre-Trial Conference or the Trial;
- 15 14. I further note that as of the date of this Declaration, Plaintiff has failed to comply with  
16 Local Rules in that he has failed to submit to the Court, or for review by Defendants,  
17 a Pre-Trial Conference Statement at least ten court days prior to the Conference.  
18 Since the Conference is set for June 17, the required joint statement was due on  
19 June 3, 2008;
- 20 15. In the instant matter, good cause does exist to extend the dates of the Pre-Trial  
21 Conference and Trial by 60 days in order to permit the Court to consider and rule on  
22 Defendants' motion to compel, as well as refer or conduct a further settlement  
23 conference as it has stated it would. The refusal of the Court to grant the instant  
24 Order Shortening Time and the accompanying Motion to Extend the Pre-Trial  
25 Conference and Trial dates would severely prejudice and harm Defendants who  
26 have reasonably relied on the representations of this Court;
- 27 16. Good cause exists for the continuance sought by Defendants for the reason that it  
28 would permit the parties to further explore settlement possibilities with the benefit of

1 the Court's ruling on the evidence previously submitted. As there have been no  
2 previous extensions sought or granted, and since the extension is for a minimal  
3 amount of time (60) days, Defendants respectfully submit that their Motion should be  
4 granted by this Court.

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7 I certify under penalty of perjury under the laws of the United States of America that the  
8 foregoing is true and correct, and that I am able to testify competently thereto.

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10 Executed in Mill Valley, California on June 4, 2008.

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David Y. Wong



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Attorneys for Defendants William Tull, Daniel Gibby and  
Gibby Novelties, LLC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PAUL MONTWILLO, an individual	)	CASE NO. C 07 3947 SI
	)	
Plaintiff,	)	ORDER OF COURT REGARDING
	)	DEFENDANTS' MOTION TO CONTINUE PRE-
vs.	)	TRIAL CONFERENCE AND TRIAL DATES
	)	PURSUANT TO LOCAL RULE 6-3
WILLIAM TULL; DANIEL GIBBY;	)	
GIBBY NOVELTIES, LLC dba ARSENIC	)	
& APPLE PIE, a California Limited	)	Date: June , 2008
Liability Corporation and DOES 1 through	)	9:00 a.m.
20, inclusive,	)	Judge Illston, Courtroom 10
	)	
Defendants.	)	The Federal Building
	)	450 Golden Gate Avenue
	)	San Francisco, CA 94102
<u>And related Counter-Claim</u>		

Complaint filed: August 1, 2007

The Motion of Defendants WILLIAM TULL, DANIEL GIBBY and GIBBY NOVELTIES, LLC, (hereinafter cumulatively referred to as "Defendants") for an Order to Continue the Pre-Trial Conference and Trial dates in this matter came on regularly for hearing on June \_\_, 2008. The Court, having considered the Motion, the accompanying Memorandum of Points and Authorities and supporting Declarations, the arguments of the other party and all materials on

MONTWILL V. TULL, ET AL. USDC Action No. C 07 3947 SI

1 the file in this matter, and GOOD CAUSE APPEARING THEREFOR, HEREBY ORDERS AS  
2 FOLLOWS:

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4  
5 \_\_\_\_\_ Defendants' Motion for Order to Continue the Pre-Trial Conference and Trial dates is  
6 granted. The Pre-Trial Conference shall be rescheduled for \_\_\_\_\_, 2008, at  
7 \_\_\_\_\_am/pm. The Trial Date is rescheduled for \_\_\_\_\_, 2008, at \_\_\_\_\_  
8 am/pm. All other dates required by the Court's Pretrial Preparation Order shall remain  
9 unchanged and in place.  
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11  
12 \_\_\_\_\_ Defendants' Motion is denied.

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14 Dated: United States District Court for the Northern District

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16 \_\_\_\_\_  
17 Honorable Susan Illston  
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